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No. 505.

Brief of Hubbard & Maury for Appellees
v. Merritt
Filed Jan 31, 1898

Supreme Court of the United States.

OCTOBER TERM, 1897.

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No. 505.

JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON MOTION TO DISMISS.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

WASHINGTON, D. C., 1505 *Pa. Ave.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

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JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

MOTION TO DISMISS.

And now come the Appellees by their Counsel and move the Court to dismiss the said Appeal for want of jurisdiction to entertain the same, for the reasons stated in the following brief.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

To Messrs. BRITTON & GRAY, *Washington, D. C.,*
Counsel for Appellants:

You will please to take notice that at 12 o'clock M., on Monday, the thirty-first day of January, 1898, or as soon thereafter as Counsel can be heard, we shall move the said Court to dismiss the appeal in the cause above entitled, for the reasons stated in the following brief.

THOS. H. HUBBARD,
WM. A. MAURY,
GEO. N. WILLIAMS,
ROBERT Y. HAYNE,
E. S. PILLSBURY,
Counsel for Appellees.

1505 PENN. AVE.,
WASHINGTON, D. C., *January* 7, 1898.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS.

This is a bill in Equity filed in the Circuit Court of the United States for the Northern District of California by the President and Trustees of Bowdoin College and others against James P. Merritt, F. A. Merritt, Thomas Prather, William E. Dargie, John A. Stanly, Harry P. Merritt, George W. Reed, Administrator &c. of Catharine M. Garcelon and O. C. Miller, Executor of Stephen W. Purington.

This case was several times before the Circuit Court, and

the proceedings on each of those occasions will be found, respectively, in 54 Federal Reporter, 55; 59 *ibid.*, 6; 63 *ibid.*, 213; 75 *ibid.*, 480. In 54 Federal Reporter, pp. 56–58, is to be found a clear and terse statement of the bill in this case, by Judge Hawley.

The Complainants are all beneficiaries under a certain deed of trust made by the late Catharine M. Garcelon to John A. Stanly and Stephen W. Purington, upon certain trusts therein limited, to which it is not necessary to refer more particularly for the purpose of this motion.

The property covered by the trust deed is of great value, and the prayer of the bill is that a decree may be entered giving repose and quiet to the title of the trustees and beneficiaries under the deed from certain pretensed claims of the defendants J. P. Merritt and F. A. Merritt, as heirs-at-law and next of kin of the said Catharine M. Garcelon, who publicly threaten to carry their pretensed claims into court, and who, for the purpose of hampering the said trustees and preventing them from disposing of property in furtherance of the trusts and intents of the said deed, are industriously engaged in slandering the title of the trustees and beneficiaries claiming under said deed, and giving out to the public that, by virtue of a certain champertous agreement they had entered into, or were about to enter into, with men of capital and influence, they had secured, or were about to secure, ample means for defraying the expenses of assailing the validity of the said deed at law, and that they had, at the same time, secured indemnity, from the same source, against forfeiture of certain property settled on them by the said Catharine M. Garcelon by a certain other deed containing certain covenants and conditions made and entered into

between her and the said Merritts for the express purpose of placing the said Merritts under an obligation not to question the validity of any future disposition which the said Catharine M. Garcelon should afterwards see fit to make, and which she, in fact, did afterwards make, by the said deed of trust.

The bill avers that this conduct of the said defendants, J. P. Merritt and F. A. Merritt, is in open violation of their express covenants and agreements with the said Catharine M. Garcelon, as aforesaid, and that, unless such conduct and threatened legal proceedings can be arrested by injunction, the large amount of unproductive real estate embraced in said deed cannot be sold for the purposes of the said trusts, but must remain a burden, indefinitely, on the said trusts and seriously impair their value.

The bill further avers that Complainants have requested the trustees Stanly and Purington to bring suit to quiet the title derived from the said trust deed, but that they have refused to comply with said request.

The Circuit Court had jurisdiction of the bill on the ground of the diverse citizenship of the Complainants and Respondents, the former being citizens of other states than California, and the latter being citizens of California.

Nevertheless, the jurisdiction of the Circuit Court was denied and controverted by the defendants, the Merritts, on the ground that the suit was promoted by their codefendants, the trustees, Stanly and Purington, and was collusive and a fraud on the jurisdiction of the Court, and should be dismissed under Section 5 of the Act of March 3, 1875.

The jurisdictional objection was raised by demurrer (54

Fed. Rep., 55), and then by plea (63 Fed. Rep., 213), and, also, by motion and answer, but was overruled in each instance.

The defendants, the Merritts, then sought to overthrow the trust deed on the grounds of illegality and of fraud and undue influence pretended to have been exerted upon Catharine M. Garcelon, the grantor, by the defendants, John A. Stanly and Stephen W. Purington, trustees in the deed.

The cause came on for final hearing on the pleadings and evidence, and, after elaborate argument, a decree was entered, on June 5, 1896, granting the relief prayed for in the bill. (75 Fed. Rep., 480.)

From this decree a direct appeal to this Court was prayed for by the defendants James P. Merritt and Henry P. Merritt, after severance from the other defendants, and was allowed, and the cause is now on the docket of this Court.

The record contains 35 assignments of error, of which the first 25, only, can be said to give any color of jurisdiction to this Court. But, for the convenience of the Court, we give all the assignments of error:

1. Because this suit involves the construction of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction of said provision excluded this suit from the judicial power of the United States granted and defined by said provision and lodged in said Circuit Court; and the said Circuit Court after being duly requested by said defendants, and by each of them respectively, so to construe said provision as to exclude this suit from the judicial power of the United States granted and defined by said Constitution, lodged in said Circuit Court, erroneously denied said request.

2. Because this suit involved the application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true application of the said provision excluded this suit from the judicial power of the

United States lodged in said Circuit Court, and the said Circuit Court, after being duly requested by said defendants, and by each of them respectively, so to apply said provision as to exclude this suit from the judicial power of the United States granted and defined by said provision and lodged in said Circuit Court, erroneously denied said request.

3. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction and application of the said provision excluded this suit from the judicial power of the United States lodged in said Circuit Court, and the said Circuit Court, after being duly requested by said defendants, and by each of them respectively, so to construe and apply said provision as to exclude this suit from the judicial power of the United States, granted and defined by said provision, and lodged in said Circuit Court, erroneously denied said request.

4. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendant James P. Merritt in and by his plea filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said plea and denied said request.

5. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendants [*sic*] James P. Merritt in and by his answer filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said answer and denied said request.

6. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to

controversies between citizens of different states, and the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendant James P. Merritt in and by his motion, in writing, filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said motion, in writing, and denied said request.

7. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, the true construction and application of said provision excluded this suit from the judicial power of the United States, and the said defendant Harry P. Merritt in and by his motion, in writing, filed in said suit, duly showed to said Circuit Court that the said true construction and application of said provision excluded this suit from the judicial power of the United States, and duly requested said Circuit Court so to construe and apply said provision, and the said Circuit Court erroneously overruled said motion, in writing, and denied said request.

8. Because this suit involves the construction and application of that provision in the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of complainants showed that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power, and from the jurisdiction of said Circuit Court (all of which appeared by said bill), and the said James P. Merritt by his demurrer to said bill duly claimed the benefit and protection of said provision of the Constitution, and duly requested and claimed such construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and said Circuit Court erroneously overruled the demurrer and erroneously denied said claim and request.

9. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed

that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power, and from the jurisdiction of the said Circuit Court (all of which appeared in said bill and in all the pleadings in the suit and in the evidence,) and the said James P. Merritt by his plea duly claimed the benefit and protection of said provision of the Constitution and duly requested and claimed such construction and application thereof as to exclude this suit from the said judicial power, and from the jurisdiction of said Circuit Court, and said Circuit Court erroneously overruled said plea and denied said claim and request.

10. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants, (and also all the pleadings in the suit) showed that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of said Circuit Court (all of which appeared in said bill and in the pleadings in the suit and in the evidence), and the said James P. Merritt by his motion, in writing, duly claimed, the benefit and protection of said provision of the Constitution, and duly requested and claimed such construction and application thereof, as to exclude this suit from the said judicial power and from the jurisdiction of said Circuit Court, and said Circuit Court erroneously overruled said motion and denied said claim and request.

11. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed that this suit was not, at any time, a controversy, and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of the said Circuit Court (all of which appeared in said bill and in all the pleadings in the suit and in the evidence), and the said James P. Merritt by his answer duly claimed the benefit and protection of the said provision of the Constitution, and duly requested and claimed such a construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and

said Circuit Court erroneously overruled said answer and denied said claim and request.

12. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants showed that this suit was not, at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power (all of which appeared by said bill) and the said Harry P. Merritt by his demurrer to said bill, duly claimed the benefit and protection of said provision of the Constitution, and duly requested and claimed such construction and application thereof as to exclude this suit from the said judicial power, and from the jurisdiction of said Circuit Court, and said Circuit Court erroneously overruled this demurrer and erroneously denied said claim and request.

13. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed that this suit was not, at any time, a controversy, and did not, at any time, involve a controversy between citizens of different states, and the true construction and application of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of the said Circuit Court (all of which appears in said bill and in all the pleadings in the suit and in the evidence), and the said Harry P. Merritt, by his answer, duly claimed the benefit and protection of the said provision of the Constitution, and duly requested and claimed such a construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and the said Circuit Court erroneously overruled said answer and denied said claim and request.

14. Because this suit involved the construction and application of that provision of the Constitution of the United States which provides that the judicial power of the United States shall extend to controversies between citizens of different states, and the bill of the complainants (and also all the pleadings in the suit) showed that this was not at any time, a controversy and did not, at any time, involve a controversy between citizens of different states, and the true construction of said provision of the Constitution excluded this suit from the said judicial power and from the jurisdiction of

said Circuit Court (all of which appeared in said bill and in all the pleadings in the suit and in the evidence), and the said Harry P. Merritt by his motion, in writing, duly claimed the benefit and protection of the said provision of the Constitution and duly requested and claimed such a construction and application thereof as to exclude this suit from the said judicial power and from the jurisdiction of the said Circuit Court, and said Circuit Court erroneously overruled said motion and denied said claim and request.

15. Because this bill showed that this suit is not a controversy and does not involve a controversy between citizens of different states, and was and is not within the jurisdiction of said Circuit Court.

16. Because the bill showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

17. Because the pleadings showed that this suit is not a controversy and does not involve a controversy between citizens of different states, and is not within the jurisdiction of said Circuit Court.

18. Because the pleadings showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

19. Because the pleadings and the evidence showed that, for the purpose of creating a case cognizable by said Circuit Court under the Act of the Congress of the United States, enacted March 3, 1875, entitled "An Act to Determine the Jurisdiction of Circuit Courts of the United States and to Regulate the Removal of Causes from State Courts, and for Other Purposes," and the Acts of Congress amendatory thereof, the parties to this suit have been improperly joined as defendants as follows, namely: John A. Stanly and Stephen W. Purington, as trustees under and by virtue of the deed of trust averred in said bill of complaint to have been made by the late Catharine M. Garcelon, and bearing date April 21, 1891, have been improperly joined as defendants, but were really and truthfully, plaintiffs, and should have been and should be joined as plaintiffs; that the said Stephen W. Purington, as such trustee, was really a plaintiff in this suit from its commencement until his death; that said John A. Stanly, as such trustee, has been ever since the beginning of this suit, and now is a plaintiff in this suit; that said John A. Stanly was at the time of the commencement of this suit, and ever since has been, a citizen of the State of California and of the same state as said defendant James P. Merritt; that said Stephen W. Purington was, until his death, a citizen of the State of California; and that this suit does not really and sub-

stantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

20. Because the pleadings and evidence showed that, for the purpose of creating a case cognizable by said Circuit Court under said Acts of Congress, parties to the suit have been collusively joined as follows, namely, John A. Stanly and Stephen W. Purington, as trustees, as aforesaid, have been collusively joined as defendants, but at the time of the commencement of this suit and ever thereafter were really and truthfully plaintiffs; that Stephen W. Purington, as such trustee, was really a plaintiff in this suit from its commencement until his death; that said John A. Stanly, as such trustee, has ever since the commencement of this suit been, and now is, really a plaintiff; that said Stephen W. Purington was, until his death, a citizen of the State of California, and that John A. Stanly, at the time of the commencement of this suit, was, and ever since has been and now is a plaintiff in this suit; both said Stephen W. Purington and John A. Stanly being citizens of the same state as said defendant James P. Merritt.

21. Because the pleadings and the evidence showed that this suit was fraudulently devised and procured to be instituted by said John A. Stanly, as a fraud upon said Circuit Court and upon the jurisdiction thereof, and that, by the fraud and collusion of the said John A. Stanly, said Stephen W. Purington and Complainants, the President and Trustees of Bowdoin College, this suit was by them as complainants, commenced, and was by them as co-complainants, collusively and fraudulently prosecuted until the death of Stephen W. Purington, and ever since the death of Stephen W. Purington by said John A. Stanly and the President and Trustees of Bowdoin College; that said John A. Stanly and Stephen W. Purington, as Trustees, as aforesaid, have been by the fraud and collusion of said John A. Stanly and Stephen W. Purington and the President and Trustees of Bowdoin College fraudulently, collusively and falsely named and feigned to be defendants in this suit, for the purpose of creating a case cognizable by the said Circuit Court under said Acts of Congress.

22. Because the pleadings and the evidence showed that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court.

23. Because the pleadings and the evidence showed that this suit is a controversy between the defendants, John A. Stanly and Stephen W. Purington (until his death) as Trustees, as aforesaid, in the names of the persons named in said bill of complaint as complaints [sic], on the one side, and said defendant James P. Merritt, as well as other defendants, on the other side; and that said John A. Stanly and said Stephen W. Purington, now deceased (until his

death) and said defendant James P. Merritt are and at all times were citizens of the State of California; that the suit is a controversy between citizens of the same state and that said Circuit Court has no jurisdiction of the controversy.

24. Because the pleadings and the evidence showed that John A. Stanly, as Trustee under and by virtue of said deed of trust, named in the bill as a defendant is really a complainant, and that his interest is identical with complainants; and that his duty is entirely to them, and that all of his acts and those of said Stephen W. Purington, his former co-trustee (now deceased) have been co-operative on the side of the complainants, and that he and his said co-trustee affected and feigned to decline bringing suit in their own name for the purpose of inducing complainants, The President and Trustees of Bowdoin College, and the other persons named in said bill of complaint as complainants, to bring suit in said Circuit Court and not in a Superior Court of the State of California, and to make said Stanly and Purington, as Trustees, as aforesaid, parties defendant on the face of said bill of complaint, and advised and induced, and procured this suit to be brought and maintained; that said Stanly and Purington, as Trustees, as aforesaid, the said The President and Trustees of Bowdoin College, improperly and collusively and fraudulently and without authority therefor, inserted as complainants the names of all the other nominal complainants in said bill of complaint, only because said other nominal complainants were citizens of other states than the State of California, all for the purpose of creating a case cognizable by said Circuit Court.

25. Because the pleadings and the evidence showed that this suit has been collusively imposed upon the jurisdiction of said Circuit Court by the persons named in said bill of complaint as complainants, and by said John A. Stanly, as Trustee, as aforesaid.

26. Because the evidence showed that the conveyances in trust alleged in complainants' bill to have been made by Catharine M. Garcelon to John A. Stanly and Stephen W. Purington, in trust, dated April 21, 1891, were a testamentary disposition of property by said Catharine M. Garcelon, in trust for charitable uses and collectively exceeding $\frac{1}{3}$ of the estate of said Catharine M. Garcelon, and were and are invalid and void by virtue of Sec. 1313 of the Civil Code of the State of California.

27. Because the evidence showed that the said conveyances being in fact testamentary as aforesaid, and a conveyance of more than $\frac{1}{3}$ of the estate of said Catharine M. Garcelon in trust for charitable uses, were a fraudulent shift and device to evade in form only, but to violate in truth and substance and effect the provisions of Sec. 1313 of the Civil Code of the State of California.

28. Because the evidence showed that the said conveyances were obtained from the said Catharine M. Garcelon by the said John A. Stanly and Stephen W. Purington fraudulently and by undue influence exerted by them upon the said Catharine M. Garcelon; that the said Catharine M. Garcelon was then an aged, sickly and feeble woman, and that said John A. Stanly then held in respect to her the confidential relation of being her attorney and counsellor-at-law and legal adviser, and the said Stephen W. Purington then held in respect to her a confidential relation, being then her confidential agent and business manager; that the said John A. Stanly and Stephen W. Purington were then vigorous persons, mentally and physically, and obtained the said conveyances from the said Catharine M. Garcelon by means of their influence over her, and resulting from the holding in respect to her of said confidential relations; that the said Catharine M. Garcelon had no independent advice in respect to said conveyances, or either of them, and made such conveyances solely upon the advice and at the solicitation of said John A. Stanly and Stephen W. Purington, and for the benefit of said John A. Stanly and Stephen W. Purington, and for the benefit of said John A. Stanly and Stephen W. Purington, as trustees, as alleged in complainants' bill, and for the benefit of themselves respectively; that said conveyances were obtained from said Catharine M. Garcelon without any consideration whatever, and embraced almost the entire bulk of her estate.

29. Because the said Circuit Court erred in decreeing that the trust conveyance dated April 21, 1891, alleged in the bill of complainants, were not a violation of Sec. 1313 of the Civil Code of the State of California.

30. Because the said Circuit Court erred in decreeing that the trust conveyances dated April 21, 1891, and alleged in the bill of complainants, were not a bequest and devise by Catharine M. Garcelon of more than ½ of her estate to persons in trust for charitable uses (said Catharine M. Garcelon dying and leaving legal heirs) in violation of Sec. 1313 of the Civil Code of the State of California.

31. Because the said Circuit Court erred in decreeing that the said trust conveyances dated April 21, 1891, and alleged in the bill of complainants, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington, by means of undue influence exercised by them upon her.

32. Because the said Circuit Court erred in decreeing that the trust conveyances dated April 21, 1891, and alleged in the bill of complainants, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington by means of fraud.

33. Because the said Circuit Court erred in decreeing that the

trust conveyances dated April 21, 1891, and alleged in complainants' bill, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington by the use by them of confidence imposed in them by her and of authority held over her by them for the purpose of obtaining an unfair advantage over her.

34. Because the said Circuit Court erred in decreeing that the trust conveyance dated April 21, 1891, alleged in complainants' bill, were not obtained from Catharine M. Garcelon by John A. Stanly and Stephen W. Purington, by taking an unfair advantage over her weakness of mind.

35. Because the said Circuit Court erred in decreeing that said trust conveyances were delivered by said Catharine M. Garcelon to John A. Stanly and Stephen W. Purington, the grantees named therein.

Wherefore, the said Defendant James P. Merritt, and also the said Defendant Harry P. Merritt do each pray that the said judgment or decree, be reversed, and that the said Circuit Court be directed to enter a decree dismissing this said suit, and awarding to each of the defendants respectively the recovery of his costs.

The record, which is of great volume, has not yet been printed by appellants, but the above presentation of the case is sufficient for the purpose of the present motion. Indeed, as the Court will perceive, the statements of fact contained in several of the assignments of error are alone sufficient to support this motion to dismiss.

ARGUMENT.

The ground on which the jurisdiction of this Court is invoked is, that the decree appealed from involves the construction and application of the provision of Article 3, Section 2, of the Constitution of the United States, which extends the judicial power "*to controversies between citizens of different States.*"

It is assigned for error, substantially, that this suit was

really the suit of the trustees, Stanly and Purington, and was in fact and law, a controversy between them and the other defendants, and that all the parties to that controversy are citizens of the same state, California; and that the alleged refusal of the trustees to sue in their own names was merely feigned, collusive, and fraudulent, to enable the Complainants to sue in the Federal Court, they all being citizens of states other than the State of California; and that the said suit was in fact brought by the said trustees, and has been carried on by them, and is being carried on by the survivor of them, John A. Stanly.

It may be repeated that these objections to the jurisdiction of the Circuit Court were overruled, in every particular, by the Court, on full consideration and after elaborate argument. (63 Fed. Rep., 213.)

The jurisdiction of this Court is invoked, by direct appeal from the Circuit Court, on the ground, already stated, that the cause involves the construction or application of the aforesaid provision of the Constitution of the United States, in other words that it is a case in equity arising under the Constitution. There is no other ground advanced on which it is claimed that jurisdiction of this appeal can be sustained. In none of the assignments of error is it pretended that there is other support for this appeal.

A case "in law or equity" may be said to arise under the Constitution whenever its correct decision depends on the construction of that instrument. (Cohens *vs.* Virginia, 6 Wh., 264, 379.)

That the denial of the jurisdiction of the Circuit Court did not, in any way, involve the construction or application of the Constitution is very clear. That Court does not

derive jurisdiction from the Constitution, but from Section 1 of the Act of March 3, 1887, c. 273, (24 Stat., 552), as corrected by the Act of August 13, 1888, c. 866, (25 Stat., 433). This Court is the only federal court that receives its jurisdiction directly from the Constitution, and which is named in and established by that instrument. All other tribunals of the United States are the creations of Congress, under the power "to constitute tribunals inferior to the Supreme Court," and are vested with so much of "the judicial power," only, as Congress, in its good pleasure, has seen fit to bestow on them.

When the appellants drew in question the authority of the Circuit Court to take jurisdiction of the cause as a controversy between citizens of different states, it was not the construction or application of the Constitution, or even of the Act of March 3, 1887, that was involved, but the construction and application of the *facts* out of which the question arose, viewed in the light of the local law of California.

The decision of that question called for the following inquiries: Whether the complainants had any interest in the property named in the bill to support this suit, in view of the contention that the trust deed was invalid under the State law, or whether, if valid, the *trustees only* had the right under that law, to file this bill, and, if not, whether the refusal of the trustees to file the bill, and the request to them to do so by the beneficiaries under the trust deed, were in good faith or simply collusive and for the purpose of attracting the jurisdiction of the federal Court and of avoiding the jurisdiction of the proper State Court.

The matters of law involved in these inquiries were all decided under the law of California, without reference to the

Constitution or the Act of Congress, the provisions of both with reference "to controversies between citizens of different states" being too plain to admit of being drawn in question without offering an affront to the intelligence of the Court, for, manifestly, if there was, in good faith, a controversy, under the law of California, between the appellees and the appellants that controversy was, necessarily, within the provision of the Act of Congress giving the Circuit Court jurisdiction over "controversies between citizens of different states."

But, if any federal law was in question in the Court below, it was *not* the Constitution. The jurisdictional objection raised by appellants could not have involved that instrument, unless the objection necessarily carried with it a challenge of the constitutionality of the Act of March 3, 1887, conferring jurisdiction on the Circuit Court, which is not pretended, for then every case involving the interpretation of an act of Congress would become a case in which the constitutionality of some law of the United States is drawn in question, within the meaning of Section 5, of the Act of March 3, 1891, giving a direct appeal in such cases, which is plainly absurd.

It follows, that if the construction of any federal law was in question in the Court below, it must have been that of the Act of March 3, 1887. It is *from Congress* and not from the Constitution, that the Circuit Courts derive jurisdiction to determine controversaries "between citizens of different states." This has been held, again and again, by this Court. (Sheldon *vs.* Still, 8 How., 441, 448; The Assessors *vs.* Osbornes, 9 Wall., 567, 575; Case of the Sewing Machine

Companies, 18 Wall., 553, 577; Holmes *vs.* Goldsmith, 147 U. S., 150, 157, 158, 159.)

In the case of the Sewing Machine Companies (*supra*) the Court say:

> Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, *it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end.* Federal judicial power, beyond all doubt, has its *origin* in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be the work of the Congress (pp. 577, 578).

This doctrine is referred to by this Court in Holmes *vs.* Goldsmith (*supra*) as having remained "*unchallenged*" and as having been "*assumed for law in numerous cases.*"

Unless, therefore, this Court should be minded to recede from this long-established doctrine, it follows, inevitably, that this appeal must be dismissed for want of jurisdiction.

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ADDENDUM.

Supposing, for the sake of argument, that the objection, taken by appellants to the jurisdiction of the Circuit Court, brought in issue "the construction or application" of the provision of the Constitution which extends the judicial power of the United States "to controversies between citizens of different States;" as a consequence, it, also, brought the suit under the category of a "*case in which the jurisdiction of the court is in issue,*" in the sense of section 5 of the act of March 3, 1891, c. 517 (26 Stat. 826), subjecting it to the requirement of said section that "*the question of jurisdiction alone shall be certified*" to this Court, as the condition of its taking cognizance of such a case on error or appeal.

It would be a strange interpretation of this language of section 5, to hold that a jurisdictional objection is withdrawn from its operation whenever it involves "the construction or application of the Constitution," as if it were, for that reason, any the less a "question of jurisdiction," in the sense of the act.

If this reasoning is correct, we are brought back again to the very question raised and decided by this Court, on a former appeal, in this case, on the motion of the present appellees to dismiss that appeal for want of jurisdiction. The question, then raised, was whether the question of jurisdiction was certified to this Court by the Circuit Court as required by section 5 of the act of March 3, 1891, and this

Court held, that the question was not so certified (167 U. S.), and so dismissed the appeal.

The question of the jurisdiction of this Court to entertain the former appeal in this case, having been decided adversely to the appeal, cannot be stirred again, on this appeal. It is *res judicata*, and there seems to be no alternative to the dismissal of the present appeal.

The contention set up in some of the assignments of error that "the construction and application" of the above-mentioned provision of the Constitution was involved in the case, below, is a mere *afterthought.*

In the court below, the whole contest was, as to whether *the facts of the case* showed "a controversy between citizens of different States" or merely a controversy between citizens of the same State. As has been already stated, that controversy was about *the meaning of the facts*, and not about the meaning of the Constitution, which, in the particular mentioned, is not susceptible of misconstruction or doubt.

But the case of Muse *vs.* Arlington Hotel Co. (168 U. S.) places it beyond doubt, that the jurisdictional objection in this case does not involve a question arising under the above-mentioned provision of the Constitution.

In that case, it was necessary for appellant to maintain that the bill presented a federal question, and the Chief Justice, in his opinion against that contention, takes occasion to say:

> "The jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship and *not on the ground* that the case arose 'under the Constitution or laws of the United States or treaties made, or which shall be made under that authority.'" "And it is settled," he proceeds, "that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim."

This seems conclusive of the question on this motion; for if the reliance of a plaintiff on the diversity of citizenship between himself and the defendant, as the basis of jurisdiction of his case, does not present a question under the Constitution, how is it possible that the defendant's traverse of the averment of diverse citizenship can make such a question?

The following remark of the Chief Justice in the case cited is equally applicable here:

> "If this case had been taken to the Circuit Court of Appeals, the decision of that court would have been final under the 6th section of the statute, and it might well be concluded that therefore the writ of error would not lie under the 5th section."

Again, if this appeal is sustainable, on the ground that it involves "the construction or application" of the Constitution, then will the wisdom and usefulness of the provision of Section 6 of the act of March 3, 1891, making final "the judgments or decrees of the Circuit Courts of Appeals" "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States," be, in large measure, defeated.

This case, being one where jurisdiction "*is dependent entirely*" on the diverse citizenship of the parties, cannot be entertained by this Court without trenching on the jurisdiction of the Circuit Courts of Appeals. The fifth and sixth sections of the act should, however, be construed so as to harmonize, and so as to repress the mischief of the old law, namely, the burdening of the docket of this Court with controversies between citizens of different States, to the prejudice of its jurisdiction as the final expositor of the Constitution, laws, and treaties of the United States.